



MASTER OF
THE ROLLS

LORD DYSON MR

COMPENSATION CULTURE: FACT OR FANTASY?

HOLDSWORTH CLUB LECTURE

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(1) Introduction¹

1. It is a real pleasure to have been invited to be the President of the Holdsworth Club this year. I believe that I am the tenth Master of the Rolls to have had the honour of presiding and addressing you; although mine is the eleventh lecture delivered by a Master of the Rolls. Lord Denning MR (who else) was President twice². He was also President as a Lord Justice of Appeal: so three lectures in total for him³. I am sure that all of my predecessors will have expressed their pleasure at being honoured with the presidency of this prestigious Club. I doubt whether any of them will have been able to say that their spouse was here as a law student and attended a Holdsworth lecture. My wife attended the lecture given by Lord Denning as a starry-eyed and excited teenager in 1966/67. I am pleased to say that she is here today to hear me deliver this lecture. I cannot vouch for her sense of excitement on this occasion.
2. In my Presidential address I want to examine '*compensation culture*'. This I imagine is something with which W. S. Holdsworth, notwithstanding his truly encyclopaedic knowledge of English law, would have been unfamiliar. We can let him off though. The term was apparently not coined until 1993; when it first appeared in *The Times* newspaper in an article by Bernard Levin entitled *Addicted to welfare*⁴.

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

² 1966 – 67; 1977 – 1978.

³ 1949 – 1950.

⁴ Cited in J. Hand, *The compensation culture: cliché or cause for concern?*, *Journal of Law and Society*, 37(4) 569, footnote 4.

3. Since 1993 the term has become ubiquitous. It has filled numerous newspaper column inches, and continues to do so. I am sure you are all familiar with the types of stories in which it features. They tend to involve the payment of large amounts of money to individuals for seemingly trivial injuries. There was, for instance, the story that ran in June and July 2011, of the school pupil who received nearly £6,000 compensation. His hand had been burnt at school during his lunch break. The burn was the result of spilt custard⁵. Last July a cleaner was reported to have received just over £9,000 in compensation for pulling a groin muscle after ‘*stumbling over a mop handle*’ and falling over⁶. And last November, it was reported that a teaching assistant received £800,000 compensation. She was said to have suffered a finger and elbow injury that occurred after she had tripped over the waist strap attached to a wheel chair⁷. Stories such as these give rise to the perception that something has gone seriously wrong with civil justice in this country. In this lecture, I want to consider whether there really is a problem and, if so, what should be done about it; or whether there is merely a perception of a problem and, if so, why that should be and what we should be doing about *that*. This is an issue which has certainly excited the media.
4. Compensation culture does not simply exercise the media. It has featured in two government studies: 2004’s *Better Routes to Redress*⁸ by the Better Regulation Task Force (the BRTF Report) and 2010’s *Common Sense, Common Safety*⁹ by Lord Young. It was the title, and subject of one Parliamentary Report¹⁰ and was the impetus behind the Compensation Act 2006. It was also the subject of a critical study published last year by the Centre of Policy Studies, entitled *The Social Cost of Litigation*¹¹. That study formed the basis of more newspaper column inches through a follow-up article by one of the study’s authors, Professor Frank Furedi, in *The Daily Telegraph*. The article’s title, ‘*The compensation culture is poisoning our society*’¹², leaves no room for doubt about the view taken in the study. Most recently it has featured as an underpinning to the Government’s consultation on whiplash claims which arise from road traffic accidents¹³.
5. What does it mean thought to talk of a compensation culture? The term means different things to different people. In 2003 it was defined by a working party established by the Institute of Actuaries as,

*‘The desire of individuals to sue somebody, having suffered as a result of something which could have been avoided if the sued body had done their job properly.’*¹⁴

⁵ See <http://www.mirror.co.uk/news/uk-news/schools-hand-out-cash-for-classroom-134505> ; <http://www.dailymail.co.uk/news/article-2011131/Pupil-awarded-6-000-custard-splash-playground-compensation-culture-costs-taxpayers-2million.html> <<http://www.dailymail.co.uk/news/article-2179757/Council-cleaner-given-9-000-compensation-tripping-MOP.html>> <http://www.dailymail.co.uk/news/article-2231196/Compensation-claims-4m-schools.html>

⁶ Better Regulation Taskforce (May 2004).

⁷ A Report by Lord Young (October 2010).

⁸ *Compensation Culture*, House of Commons, Constitutional Affairs Committee, (Third Report of Session 2005–06) (HC 754–I).

⁹ F. Furedi & J. Bristow (September 2012) <<http://www.cps.org.uk/files/reports/original/120905122753-the-social-cost-of-litigation.pdf>>.

¹⁰ F. Furedi, *The compensation culture is poisoning our society*, (Daily Telegraph, 9 September 2012) <<http://www.telegraph.co.uk/comment/9530139/The-compensation-culture-is-poisoning-our-society.html>>.

¹¹ Ministry of Justice, *Reducing the number and costs of whiplash claims – A consultation on arrangements concerning whiplash injuries in England and Wales* (December 2012) at 8 & 22 <<http://www.justice.gov.uk/news/press-releases/moj/government-action-on-whiplash-claims>>

¹² J. Lowe et al, *The Cost of Compensation Culture* (2002) at 2.1 <<http://www.actuaries.org.uk/research-and-resources/documents/cost-compensation-culture-working-party-report>>

The problem with this definition is that it fails to capture the commonly critical meaning the term carries with it. A desire to sue somebody who has caused you a loss arising from their blameworthy conduct is not unreasonable. It is in fact the basis of our law of tort, and in particular of negligence. A better definition was the one set out by Lord Falconer, the former Lord Chancellor. In a speech given at a conference organised by the Health & Safety Executive in 2005, he defined compensation culture in this way:

‘Compensation culture’ is a catch-all expression. . . It’s the idea that for every accident someone is at fault. For every injury, someone to blame. And, perhaps most damaging, for every accident, there is someone to pay.¹⁵

6. Here then is the crux of it. Compensation culture encapsulates the idea that for every accident, for every injury or loss suffered someone other than the individual who suffers the loss is to blame and to borrow the phrase, where there’s blame there is a claim – and there’s always blame. Compensation is being sought improperly because the claims do not rest on the application of any legal principles, such as the need to establish a duty of care, negligence or causation. On the contrary they rest on the idea that all an individual need do is rush to litigation irrespective of the legal merits of a claim and riches will follow. This people can do because no matter how trivial, vexatious or spurious the claims are, they can afford to litigate because of no win – no fee agreements. Just as significantly, the potential costs to employers, businesses etc of defending such claims are so prohibitive, due to the nature of the no win – no fee agreements, that they have no real choice but to concede claims irrespective of their legal or factual merit.
7. As a consequence, the perception is that as a society we have witnessed a cultural shift. No longer is British society characterised by a somewhat philosophical and accepting approach to life. The growth of compensation culture has seen a shift in this approach, with more and more individuals suing at the drop of a hat for any injury; as the media reports are taken to demonstrate. More perniciously, this has been accompanied by a growing burden on employers, businesses, schools, the NHS and local and central government of costs (both in respect of compensation and even worse legal costs, which often substantially exceed the amount of compensation). All of this is also said to give rise to defensive practices on their part. Schools are said, as a consequence of compensation culture, to ban conker fights in schools¹⁶, ban playing football with leather footballs¹⁷. School trips no longer take place. And so on.
8. There is however a problem with this picture. It rests on the central idea that more and more people are claiming compensation. The evidence does not necessarily bear that out. A study in 2006 by Lewis, Morris & Oliphant concluded that there had been no real increase in personal injury claims since 2000¹⁸. The Parliamentary enquiry which reported in the same year concluded that the *‘evidence does not support the view that increased litigation has created a “compensation culture”*.¹⁹ Most significantly the

¹⁵ Lord Falconer, *Compensation Culture*, (22 March 2005) at 1 – 2 <<http://www.hse.gov.uk/risk/lordfalconer.pdf>>

¹⁶ <<http://www.dailymail.co.uk/news/article-1378251/One-schools-ban-conkers-elf-n-safety-fears--leapfrog-marbles-threat.html>>; <<http://www.telegraph.co.uk/education/educationnews/8458526/Schools-banning-conkers-and-leapfrog-over-safety-fears.html>>

¹⁷ <<http://www.bbc.co.uk/news/uk-england-gloucestershire-15023580>>

¹⁸ (2006) *Torts Law Journal* 158

¹⁹ (HC 754-I) at13.

BRTF Report, which was published two years earlier, concluded that the very idea of there being a compensation culture was a myth²⁰.

9. The BRTF Report drew, amongst other things, the following three conclusions about compensation culture. First, that it encompassed a perception that we are '*becoming more like the United States*', in that more and more people are '*suing others for large sums of money, and often for what appear to be trivial reasons*.' I want to return to this. Secondly, this perception is in turn fed by the media and claims management companies, which encourage people to make such claims '*by creating a perception, quite inaccurately, that large sums of money are easily accessible*.' Thirdly, this has created a '*real problem*'. In the words of the Task Force,

'It is this perception that causes the real problem: the fear of litigation impacts on behaviour and imposes burdens on organisations trying to handle claims. The judicial process is very good at sorting the wheat from the chaff, but all claims must still be assessed in the early stages. Redress for a genuine claimant is hampered by the spurious claims arising from the perception of a compensation culture. The compensation culture is a myth; but the cost of this belief is very real.

It has got to be right that people who have suffered an injustice through someone else's negligence should be able to claim redress. What is not right is that some people should be led to believe that they can absolve themselves from any personal responsibility for their actions and then expect someone else to pick up the pieces when something goes wrong. . . .²¹

10. We are left then with a conundrum. There was, and still is as Lord Young's 2010 Report²² and the Government's recent Whiplash consultation makes clear, a perception that there is a compensation culture²³, and that perception has real, and negative, consequences. That perception is not however as grounded in reality as had been suggested. The question for me today is to what extent can the perception be challenged through an examination of the operation of the justice system.

11. But before I develop this further, I need to say something about claims for whiplash injuries in road traffic accidents. Whiplash claims have risen by a third in the last three years to about 550,000 a year, even though the number of accidents has fallen during that period. Jack Straw suggested setting up independent medical panels to assess the claims more closely. He said: "There were a handful of whiplash claims before 2004. It is only since these claims companies have sprung up that they have grown. The people of England and Wales now have the weakest necks in Europe". The Ministry of Justice consultation paper said that whiplash claims contribute to the high cost of motor insurance and the perception of a compensation culture. But it is important to distinguish fraudulent claims from what I am talking about. I am talking about the question whether there is an expectation in our society that for every *genuine* injury, there must be someone to blame. I am not talking about fraud. Regrettably, there will

²⁰ The BRTF Report at 3 and passim

²¹ Better Regulation Taskforce (May 2004) at 3.

²² Lord Young (2010) at 19, '*The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality.*'

²³ Ministry of Justice (2012) at 8, '*The consultation is aimed at all stakeholders with an interest in reducing the number and cost of whiplash RTA claims, which contribute to the high cost of motor insurance in England and Wales and the perception of a 'compensation culture'.*'

always be dishonest people who seek to profit out of fraudulent activity. Such activity is by no means confined to the world of civil litigation. Nor is it confined to whiplash claims. At one stage, there was an epidemic in Liverpool of claims against the local authority for damages for injuries suffered for slipping on pavements. For some time, claims have been made for stage-managed car crashes, involving so-called “crash for cash” criminal gangs. But to return to what I am talking about.

(2) An American Future?

12. One of the underpinnings of the perception that there is a growing compensation culture is the view that we are becoming more American. That was the BRTF Report’s understanding. In some ways this is not surprising given the influence which US culture has had over the last fifty years. The ubiquity of US television programmes, literature, films, Facebook is as unremarkable now as the opening of the first McDonald’s was remarkable in October 1974²⁴.
13. We are all familiar with, or at least might think we are familiar with, the US legal system; from Perry Mason, to LA Law, Boston Legal, Damages, The Good Wife, and Suits on television and innumerable films. We know all about contingency fees, punitive damages and civil jury trials. We are equally likely to believe that the US is the home of compensation culture with individuals being only too ready to issue spurious claims, and being awarded massive sums in damages. The view that we are going down this American path has certainly informed the view of the media. A couple of examples highlight this. The first is taken from the Daily Star newspaper from November 2003 and was cited in the BRTF Report. It was a comment by Vanessa Feltz. She said this,

“We live in a compensation culture. Everyone’s running scared of litigation. Terror of being sued means it’s only minutes until pavements are painted with gigantic government warnings in case we catch our stilettos in a crack and sue the local council. And overpaid café lattes will carry huge labels lest you burn your tongue and slap a writ on them like the American plonker who gulped her McDonald’s coffee and took Ronald McD to the cleaners.”²⁵

14. Another example, again from 2003, can be found in a Daily Mail article by Anthony Hilton. He said this,

‘The claims culture and the compensation culture have taken root [here]. . .

It is not as bad yet as in the United States, for which we should be grateful. McDonald’s had to pay out for not telling a customer the coffee she bought and then spilled was hot, but a similar claim here was tossed out because coffee is meant to be hot. That is as nothing, however, when compared with the Winnebago case where the driver left the wheel of his mobile home while his vehicle was speeding down the freeway and went into the back to brew a coffee. With no-one steering, the vehicle crashed, but the owner

²⁴ < <http://www.mcdonalds.co.uk/ukhome/whatmakesmcdonalds/questions/running-the-business/company-history/when-did-mcdonalds-first-uk-restaurant-open.html>>

²⁵ Cited in BRTF Report at 13.

*sued successfully because no-one had told him it was unsafe to leave the driver's seat when doing 70mph.*²⁶

15. The examples used in these two articles are interesting. The both paint a vivid picture of litigation that yields massive and seemingly unjustifiable reward for the individuals who claim. They also make the point, which has featured in the recent criticism here of our compensation culture, that the claimants seem to have lost all sense of personal responsibility. The two examples however repay more detailed scrutiny.
16. First, the Winnebago case. Its central premise was that a driver got up from the wheel of a speeding motor home to go and make a cup of coffee. The aspect of the story not told is that the driver was said to have wrongly understood that his new motor home's cruise control operated like a plane's auto-pilot. Switch it on and it drives itself. The manufacturer's alleged liability was based on its failure to put a warning in the driver's manual that cruise control was not an auto-pilot device. The owner apparently sued the manufacturer successfully for a sum in excess of a \$1 million, and the manufacturer changed the owner's manual to incorporate a suitable warning.
17. Most people would react to this example with sheer incredulity. How could a court find in favour of the claimant and make such a massive award of damages? Surely this is the very epitome of an unjustifiable compensation culture that enables individuals to absolve themselves from all responsibility for their own actions no matter how ridiculous, while foisting liability onto someone who on any reasonable analysis could not be to blame?
18. We would all tend to agree that, if that was where we were heading, then not only would a compensation culture have taken hold, but we would have, as a society, lost our grip on reality. The problem with this case is perhaps best summed up by another newspaper headline: this time from America itself. The problem, as described by the *LA Times*, is that the story was '*a complete fabrication*'²⁷. It was a myth, and one that in numerous guises has apparently been retold since the early 1980s.
19. So much for the Winnebago case. What about the spilt coffee case? Most of you have probably heard of this case which, as reported in the media, involved a woman who sued McDonalds because its coffee was too hot. She had bought herself a cup of coffee from a drive-thru McDonalds, and was driving along with the cup placed between her legs. The coffee spilled all over her legs, burning them. Rather than chalk this up to experience or think how stupid she was to rest the hot coffee she had bought between her legs whilst driving, she sued McDonalds and, as the story goes, she won her claim and was awarded millions in damages.
20. As with the Winnebago case, we can see the clear outlines of a compensation culture here. It appears to show an individual passing the blame for an apparently trivial event onto a third party; a third party that could not in a reasonable world be viewed as responsible. Something has surely gone badly wrong here. Coffee is expected to be hot.

²⁶ A. Hilton, *Reforms the Insurers Must Risk*, Daily Mail (10 September 2003) <<http://www.dailymail.co.uk/money/news/article-1520339/Reforms-the-insurers-must-risk.html>>; also see Vanessa Feltz, Daily Star, 15 November 2003 cited in Better Regulation Taskforce (May 2004) at 13.

²⁷ M. Levin, *Legal Urban Legends Hold Sway*, LA Times (14 August 2005) <<http://articles.latimes.com/2005/aug/14/business/fi-tortmyths14>>

Driving with a cup of hot coffee wedged between one's legs is an absurd thing to do. Surely it is equally absurd to hold McDonalds liable if the coffee spills and causes injury. It is therefore hardly surprising that Teresa Graham, who led the Better Regulation Task Force's litigation team, was able to note in 2003 that '*Everyone says that litigation has got completely out of hand in the States.*'²⁸

21. But again we need to look behind the newspaper story. The case was *Lieback v McDonald's Restaurant*²⁹. In February 1992, Mrs Stella Lieback was sitting in the passenger seat of her nephew's car. She was not in fact driving at all. The car was stationary. She had placed the cup of coffee between her legs in order to hold it still while she tried to take the lid off. The coffee was hot. What Mrs Lieback did not know was that the coffee had been heated to between 180 – 190 degrees. The coffee spilt. It soaked through her trousers. As a consequence, she suffered third-degree burns to various parts of her body. She remained in hospital for eight days' treatment, had to undergo skin grafts, was partially disabled for two years and scarred permanently.
22. Ms Lieback did not rush to the courts. Initially she wrote to McDonald's asking if they would pay for her medical costs and her daughter's lost wages (her daughter had taken time off work to look after her). In total she asked for a payment of between \$10 - \$15,000; which, in view of the level of US medical expenses, might be thought to be a rather modest amount. McDonald's offered her \$800. Six months later she hired an attorney and sued. The cause of action was one based on strict liability under certain statutory provisions. It was not a negligence claim. She also sought punitive damages on the basis that she alleged that McDonald's knew the coffee could cause serious harm, and that it was recklessly indifferent in its approach to the welfare of its customers³⁰.
23. In the US, civil claims are generally still heard before a jury. Members of the jury are reported to have commented that they were '*insulted*' to be asked to hear such a case; that the claim '*sounded ridiculous*'; and that they were being asked to waste their time on '*A cup of coffee.*'³¹
24. Their view obviously changed during the trial, since they found McDonald's liable, albeit with 20% contributory negligence on Ms Lieback's part. They awarded \$160,000 in compensatory damages for the third degree burns, partial disability and permanent scarring and \$2.7 million in punitive damages, which was intended to represent two days' profits earned by McDonalds on its coffee-based activities. The award of punitive damages was reduced by the judge to \$480,000. The claim subsequently settled – no doubt in the face of a possible appeal by McDonalds –for an undisclosed sum, but presumably for an amount less than the total sum awarded by the court.
25. It became clear at trial that McDonalds knew that there was a problem with its coffee. From 1982 – 1992 over 700 claims had been brought against it arising out of coffee burns, some of which involved third-degree burns. It had done nothing to change the coffee it served in the light of these claims. It knew that the coffee, which it insisted was served at a temperature of between 180 – 190 degrees, was hazardous. McDonalds'

²⁸ Better Regulation Taskforce (May 2004) at 38.

²⁹ No. 93-02419 (1995 WL 360309) (D. N.M. Aug. 18, 1994); see further C. Forell, *McTorts: The Social and Legal Impact of McDonald's Role in Tort Suits*, [2011] Loyola Consumer Law Review [Vol. 24:2] 105 at 134ff.

³⁰ C. Forell at 135 – 136.

³¹ C. Forell at 136 – 137.

quality assurance manager admitted its coffee was not '*fit for consumption*' and that it would scald the throat. Its own expert accepted that coffee served at more than 130 degrees could produce third degree burns, and that coffee served at a temperature of 190 degrees would burn skin in 2 – 3 seconds. It becomes clearer, in the light of this, why the jury was willing to find that the coffee was a defective product, and that McDonalds had sold it in breach of the implied warranty of merchantability and of fitness for purpose.³²

26. When looked at in this way, it hardly seems a case of compensation culture gone mad at all. It was not a trivial case, but one of severe injury. It was not based on negligence, but on a form of strict statutory liability where the claim was supported by the defendant's own evidence. The claimant had not rushed to the courts, but only litigated after her request for reimbursement of medical costs had been rejected.

(3) UK not USA

27. The two US examples when considered in more depth present a picture markedly different from the one presented in the media. One story was fabricated. The other bore little resemblance to the real facts. As regards the McDonald's case, it is a mythical picture that caught the imagination in the United States as a consequence of deep-rooted political arguments in favour of reform of its tort law. This is not the place to consider whether these arguments are justified. There is no comparable political argument here concerning our substantive law. There is no clamour for reform of our product liability law or the tort of negligence. I suggest that the reason for this may be because, with very limited exceptions, juries do not decide tort claims here and our judges adopt a measured and sensible approach in applying the principles of tort law which have been crafted and refined in the crucible of the common law over a very long time. I can illustrate this by referring to our own English McDonald's coffee case that was tried here in 2002.

28. In *Bogle & Others v McDonald's* Field J dealt with a series of preliminary issues arising out of a number of claims that were being dealt with under a Group Litigation Order. There were a total of 36 claimants. The majority were children between the ages of 4 and 16. While they had each brought separate claims against McDonald's arising from distinct incidents in which they had each suffered personal injuries in the form of burns caused by spilled hot drinks; specifically hot coffee sold by McDonald's at around the same temperature as the coffee sold in the Lieback case. Factually then the claims were similar to the Lieback claim. The claims also raised similar legal issues to those in issue in the US claim. One issue, for instance, was whether the coffee cup lids were a poor fit, such that McDonald's had been negligent in using them. Another was whether McDonald's had sold a defective product under the terms of the Consumer Protection Act 1987. The claim also raised the question of whether McDonald's were negligent in dispensing and serving hot drinks at the temperature at which they were served. Just as in the Lieback case, so here it was clear, as Field J put it, that there '*was a risk that a visitor might be badly scalded and suffer a deep thickness burn by a hot drink that is spilled or knocked over after it has been served.*³³'

³² K. Cain, *The McDonald's Coffee Lawsuit*, Journal of Consumer and Commercial Law 15 at 15 - 17 <<http://www.jtexconsumerlaw.com/V11N1/Coffee.pdf>>

³³ [2002] EWHC 490 (QB) at [16].

29. If, as was suggested in the media a year after this case was decided, we were in the grips of a compensation culture, the claim would surely have succeeded. But the claimants failed on all issues. McDonald's was held not to have been negligent in serving coffee at high temperatures. Its cups and their lids were held not to have been constructed negligently. The judge held that there had been no breach of consumer protection law. On this basis it ought to be reasonably clear that if the Lieback claim had been brought in our courts, it too would have failed.
30. This case raises a number of issues: the role of the media and the difference between substantive law and procedure. Looking at the role of the media first. The BRTF Report summed up the central problem with stories such as those relating to the US McDonald's case. It concluded that, '*Many of the stories we read and hear either are simply not true or only have a grain of truth about them.*³⁴' A false perception is created. What would the two US media stories have looked like if they had included a reference to *Bogle v McDonald's*? Rather than present a picture that we were on the way to a US-style litigation culture, our media could properly have done the opposite. Our media could have made the point that in the US, this type of claim tends to succeed, whereas here it tends to fail. In the US there is a rampant litigation culture (although as we have seen even there the media reports are not always accurate). Here there is no such culture. It is not difficult to imagine an entirely positive account being given of the robust nature of our legal system and our substantive law; a positive account, which rather than presenting the view that unmeritorious claims are likely to succeed here, would properly reinforce the view that litigation is not a route to automatic compensation in every case. But such a measured and accurate good news story would be unlikely to appeal to the media.
31. Given the ease with which the *Bogle* case could have been used to exemplify why we are not heading towards a US-style compensation culture the question arises why it was not. A similar question arises in respect of the numerous cases that are reported as showing that we are in the grip of compensation culture. At the heart of most of these cases, such as the ban on conker-playing at school or the ban on sack races at a school sports day, lies a claim that it is all because of health and safety. But in most cases, as the Health & Safety Executive is at pains to point out, health and safety legislation is irrelevant. The sack race ban, for instance, had nothing to do with health and safety. The race did not take place because the teacher concluded there was not enough time to fit all the events in on the day³⁵. The conker example rests on a misunderstanding of the law by a no-doubt well meaning head-teacher and is described by the HSE itself as '*a truly classic myth.*³⁶
32. Health & Safety serves as a useful scapegoat and makes a good story, in the same way that the Winnebago case makes a good story. It plays a role, which a proper understanding of the law would not have let it play. The sack race story, if reported properly could, like the *Bogle* case, have been used to highlight how we are *not* in the grip of a compensation culture: the race could easily have gone ahead if there was sufficient time. The conker ban story, if it had been reported in another way could have been used in an educative way: to highlight how there had been a misunderstanding as to the true position. In both types of case, rather than adopt a position of unthinking

³⁴ BRTF Report at 12.

³⁵ H. Frankel, *Handle with care*, (TES, 7 August 2009) <<http://www.tes.co.uk/article.aspx?storycode=6019088>>

³⁶ <<http://www.hse.gov.uk/myth/september.htm>>

criticism, a more balanced, fair and accurate account would have stated that the true position is that we are not in the grip of a compensation culture. Perceptions could have been shaped differently to match the reality. Of course, stories written in this way would not have been as newsworthy as those which were written. Nor would they have fitted nicely with the notion that our society is being undermined by over-zealous regulation in the field of health and safety, the growth of the nanny state, EU regulation, a rights-culture and the depredations of fat cat ambulance-chasing lawyers. Indeed, I suggest that such good news stories would simply not be written.

33. The *Bogle* case raises another issue: the difference between substantive law and procedure. The *Bogle* case failed on the basis of a sensible and conventional application of well-known and well-understood principles of law. Nor was it an isolated example. A couple of examples can illustrate this. The first is the case of *Tomlinson v Congleton Borough Council & Others*³⁷ from 2003. John Tomlinson, the claimant, one hot bank holiday weekend in 1995 decided to go for a swim. He and friends were in the local park. They had been there many times before. In the park there was a flooded sand quarry, which had been made into a nice place for families to sunbathe and paddle in the water. As it was such a nice day, and he was hot, he decided to dive into the water to cool off. This was not the first time he had done this. Tragically however he hit his head on the bottom of the quarry. He broke his neck and, as a consequence was left a tetraplegic. He sued the local council. The House of Lords ultimately rejected the claim. In doing so Lord Hoffmann reiterated a point which the media should have in mind when they consider whether we are heading towards a compensation culture. He said this,

*‘ . . . the law does not provide such compensation simply on the basis that the injury was disproportionately severe in relation to one's own fault or even not one's own fault at all. Perhaps it should, but society might not be able to afford to compensate everyone on that principle, certainly at the level at which such compensation is now paid. The law provides compensation only when the injury was someone else's fault.’*³⁸

To succeed in his claim Mr Tomlinson had to establish that the injury was as a matter of law attributable to the fault of someone else. That is what had to be established in the *Bogle* case. The law requires fault. It requires a duty of care, breach and causation of loss. These are not always straightforward matters to establish. The courts have certainly not taken an approach which has lowered the standard of care, made it easier to establish negligence or introduced a test which allows claims to succeed in the absence of fault (except, of course, where the law imposes strict liability). For a compensation culture properly to take hold, there would have to be a major shift in our substantive law. As neither the Supreme Court nor Parliament appears to be moving towards such a realignment of the substantive law, it does not appear likely that we have in fact laid what would be the one true foundation of a compensation culture.

Our courts are very aware of the dangers of contributing to a climate of encouraging the idea that anyone who suffers an injury must have a remedy in damages. The judges apply the law rigorously. If I can be forgiven for mentioning a case which I tried many years ago now. It concerned a mountaineering accident. The deceased hired a mountain guide to guide him up one of the peaks in the Mont Blanc range in the Alps. He had never climbed before. The two of them set off and, because the deceased was

³⁷ [2003] UKHL 47, [2004] 1 AC 46.

³⁸ 2003] UKHL 47, [2004] 1 AC 46 at [5].

inexperienced, they made slow progress. It was a very hot day and they should have started earlier than they did. In order to get out of the line of falling rocks that had been detached from the ice by the heat of the sun, the guide took a short cut and hammered only one bilay into the snow instead of two. The bilay came out and the deceased fell to his death. His widow brought claim alleging negligence. I heard a good deal of expert evidence and concluded that the guide had failed to meet the standard of care to be expected of a competent mountain guide. I was acutely aware of the fact that mountaineering is an inherently dangerous activity and that accidents will happen without negligence. I went out of my way to explain this in my judgment and to say that I had concluded on the evidence and on the facts of this case that there had been negligence. Despite my best efforts to explain this decision, my judgment provoked some criticism in the media. I was said to be an out of touch judge more at home in the leather armchair of my club (I have never been a member of a club); lacking in understanding of the realities of outdoor pursuits; and dangerously contributing to the disappearance of excitement in life. I mention this anecdote because, although I found for the widow in that case, I do not believe that it can be said that my decision made a contribution to compensation culture.

(4) Costs and ADR

34. So there have been no developments in our substantive law which can be said to encourage a compensation culture. It is noteworthy that the number of personal injury claims that actually reach court has not increased. But it can properly be said that the majority of claims brought do not reach the courts. They settle before proceedings are issued or before trial and judgment. So it may be said that compensation culture is not about what goes on in court, but rather about what happens outside the court room. The damage caused by the perception that we have a compensation culture happens before matters reach the door of the court. Secondly, it may also be said that the increase in claims brought, and settled in this way, has been the result of two reforms to our justice system and one on-going problem.
35. The on-going problem is that of litigation cost. Litigation has for a long time been far too expensive. Faced with the prospect of expensive litigation, a potential defendant may feel a pressure to settle even an unmeritorious claim. This pressure has to a certain degree always existed. It increased, especially in relation to personal injury claims, following the reform of conditional fee agreements by the Access to Justice Act 1999. The intention of those reforms was to make CFAs more attractive to claimants in order to increase access to justice to those who previously would not have qualified for legal aid, as well as to provide funding for those for whom legal aid was no longer available. But an unintended consequence of this reform was to inflate legal costs, specifically the costs that defendants are liable to pay. They were inflated to such a degree that, in many cases, it was simply cheaper to buy off a claim through settling it, than properly contest it. As the pressure to settle unmeritorious claims increased, it was inevitable that there would be a rise in the number of unmeritorious claims brought; and the growth in the number of such claims and the concomitant increase in costs was matched by an increase in the number of claims management firms and an increase in advertising and other practices aimed at drumming up work. It is plain to see how a compensation culture could arise in this way.
36. We are however on the verge of introducing reforms to our system of litigation funding and costs. These reforms, which arise from a year-long study by Sir Rupert Jackson, a justice of the Court of Appeal, are intended to do two things. First, through extending

judicial control over litigation specifically into the arena of costs as well as other changes to civil court procedure, they are intended to reduce the overall level of costs. Secondly, they undo the damage done by the 1999 Act legislation in relation to CFAs. The changes required legislation which is contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Taken together, the procedural reforms and the reform of CFAs should go a considerable way to reducing the pressure on defendants to settle unmeritorious cases. Through bringing costs under control, and removing the perverse incentives to settle claims lacking in merit, we should be able to make substantial improvements to this aspect of the system. The pressure to settle such claims should be reduced, if not eliminated. Effective equality of arms between those bringing claims and those defending them should be re-established. Most importantly defendants will be able to secure their right to fair trial, through ensuring that they can properly defend those claims that are properly defensible. As a consequence, I hope that we shall discourage any misguided sense that, simply by raising a claim no matter how hopeless, a claimant will receive compensation and costs.

37. The second reform that could be seen as contributing to a pressure to settle even hopeless claims, and thus foster a sense that there is a compensation culture, is the promotion of settlement itself. From the mid-1990s there has been an increased emphasis on the imperative to settle claims. This has been for entirely proper reasons. Settlement, or more formally Alternative Dispute Resolution (ADR), is very often in the public interest. It ensures that the court system, with its limited resources, can concentrate on those claims that truly need formal adjudication. It ensures that parties do not expend time and money on claims that can be resolved informally. The courts have properly supported ADR through, for instance, taking a robust approach to encouraging the use of ADR both before and after proceedings have commenced. This they have done, amongst other things, by imposing costs sanctions where a party has unreasonably refused to mediate.
38. Again, it is possible to discern a potentially subtle pressure here, to settle cases which would otherwise have gone to trial and might have failed. The existence of such a pressure can equally tempt a claimant to make a claim that lacks merit. If there is a likelihood that the claim will be settled (through a congruence of pressures of cost and the need to settle), then why not give it a try? The courts have, however, been particularly alive to the potential abuse of ADR. The question of the proper use of mediation came before the Court of Appeal in two cases, one in 2004 and the other in 2005. The first case was *Halsey v Milton Keynes NHS Trust*³⁹. The second was *Daniels v Commissioner of Police for the Metropolis*⁴⁰. I was part of the Court which heard both cases.
39. The *Halsey* case arose out of the treatment of Mr Bert Halsey by Milton Keynes General Hospital which resulted in his death. The basis of the claim in negligence was an allegation that he died as the result of a nasogastric feeding tube being incorrectly fitted, so that liquid food was directed into his lungs instead of into his stomach. Two different explanations were given as to how the liquid feed found its way into his lungs. One supported the allegation. The other (innocent explanation) was that the presence of liquid feed in his lungs was due to regurgitation followed by aspiration of the stomach contents. The claim ultimately failed at trial.

³⁹ [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002.

⁴⁰ [2005] EWCA Civ 1313, [2006] CP Rep 9.

40. The *Daniels* case was brought by a police officer who was employed in the police mounted branch. PC Daniels suffered an injury as a consequence of being thrown from her police horse during a training exercise. She claimed that the injury was caused by negligence on the part of the police inspector who was in charge of the training session. This claim also failed. On all liability issues the defendant succeeded and did so 'comprehensively'.⁴¹
41. Neither claim could properly be called examples of compensation culture. Both were genuine rather than frivolous claims. Neither was hopeless, despite the fact that they were both dismissed at trial. In both cases, however, the claimants' solicitors applied strong pressure in an effort to try to secure a settlement. In the *Halsey* case the defendant made it clear from the outset that it would not settle the claim. This was because it was sure that there had been no negligence. Mediation as a means of securing settlement would simply have added unnecessary expense to the proceedings. In the *Daniels* case, the claimant had sought to bring pressure to settle to bear on the defendant through the use of a Part 36 Offer. That is an offer to settle the claim, which if refused by the defendant, can in certain circumstances result in them being deprived of their costs even if they succeed at trial. The defendant refused the Part 36 Offer.
42. In both cases it was argued that the defendant should not be permitted to recover their litigation costs from the unsuccessful claimant. In *Halsey* it was said that this was because the defendant unreasonably failed to mediate. In *Daniels* it was said that the refusal to accept the Part 36 Offer was akin to an unreasonable failure to attempt to settle the claim by mediation. Both arguments failed. In *Halsey* the Court of Appeal said that it would be an unacceptable fetter on access to justice if truly unwilling parties were required to mediate. It went on to say that, in deciding whether a party should be deprived of their costs for failing to mediate, the key issue was whether the refusal to mediate was unreasonable. It then set out a number of guidelines to assist the determination of that question. The Court applied these guidelines in the analogous situation (refusal to negotiate) that arose in *Daniels*.
43. If the Court had adopted an approach that either provided for mandatory mediation or provided a lower threshold test for establishing whether a successful party should be deprived of their costs for a failure to mediate or accept a Part 36 Offer, it is likely that it would have done more harm than good. The proper promotion of ADR is, as I have said, a public good. But undue emphasis on it can provide a further incentive to the prosecution of unmeritorious claims. It could help to feed the perception that we have a compensation culture, where frivolous claims lacking legal merit can be brought because a defendant either has to incur the cost of mediation or because the risk of adverse cost consequences of a failure to mediate, combined with high background costs in any event, render a settlement the economic choice rather than the right choice.
44. Some have said that in *Halsey* the court did not go far enough to support mediation. I thought then, and I still think now, that it struck the right balance. It was careful to protect the interests of defendants who had a genuine and entirely proper desire to resist claims that they reasonably believed to be without merit. It was equally careful to support the promotion of settlement. In doing so, it sent out a clear message that

⁴¹ [2005] EWCA Civ 1313, [2006] CP Rep 9 at [6].

neither litigation nor mediated settlement are devices which could or should be used as a means to secure unjustified windfalls for individuals who are trying it on.

45. I accept that there remains the potential for the promotion of ADR and settlement to feed into a background consciousness that supports the perception that we have a compensation culture. But it seems to me that the robust stance that the Court of Appeal took in these two cases – and which has informed practice generally since then – has muted that potential. This robust stance, taken together with the impending costs reforms, should help to ensure that any perception that we have a compensation culture can be dispelled in the coming months and years. Just as our substantive law does not support the creation of this perception, nor should our procedural law – its approach to ADR does not support that perception and soon its approach to costs and funding will not do so either.

(5) Conclusion

46. Where does this leave us? First, I doubt very much whether we are likely to see – in the medium term at least – any reduction in news stories expressing concern about our compensation culture. It is something of a mystery to me why the media find the compensation culture such a fascinating subject. I believe that they do not suggest that, in so far as there is such a culture, the judges are responsible for it. As I have said, such a suggestion would be quite unjustified. It is true that conditional fees have encouraged the rise of claims companies who sell claims to lawyers; and have encouraged lawyers to seek out as clients anyone who has, or may have, suffered an injury to make a claim. It is also true that defendants have tended to settle claims because they perceive that it is cheaper to do so than to fight a battle in court.

47. Secondly, I think the reforms to litigation cost and a continued robust approach to the appropriate use of ADR will go a significant way towards removing any improper incentive for individuals to pursue claims lacking in merit on the basis that, through fear of costs, a defendant will simply buy off the claim.

48. All of this may also require a substantive educative effort on the part of government, the courts and the legal profession to counter-act the media-created perception that we are in the grips of a compensation culture. It may also require greater public legal education. Given the possible benefits to society of reducing the perceived need for businesses, local and central government and so on to engage in unnecessarily defensive practices, it is to be hoped that this educative effort will pay for itself.

49. But perhaps the only sensible conclusion to draw is that, if you want a definitive answer to the question whether and to what extent compensation culture is fact or fantasy, you might be advised to ask the question of my successor when he or she becomes the eleventh Master of the Rolls to be your President.

50. Thank you.

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